

which are identifiable by an archivist as records of an agency as defined in §1275.16(f). The Archivist will process these requests in accordance with the Freedom of Information regulations set forth in §1254.30 of this chapter or pertinent successor regulations.

(b) In order to allow NARA archivists to devote as much time and effort as possible to the processing of materials for general public access, the Archivist will not process those Freedom of Information requests where the requester can reasonably obtain the same materials through a request directed to an agency (as defined in §1275.16(f)), unless the requester demonstrates that he or she has unsuccessfully sought access from that agency or its successor in law or function.

[51 FR 7230, Feb. 28, 1986, as amended at 61 FR 17846, Apr. 23, 1996]

#### APPENDIX A TO PART 1275—SETTLEMENT AGREEMENT

Settlement Agreement filed April 12, 1996, in *Stanley I. Kutler and Public Citizen v. John W. Carlin, Archivist of the United States, and William E. Griffin and John H. Taylor, Co-executors of Richard M. Nixon's Estate, Civil Action No. 92-0662-NHJ (D.D.C.) (Johnson, J.)*. By letter dated April 17, 2001, NARA and the Nixon estate agreed to waive paragraph 11 of this Settlement Agreement, such that the delay on public copying until January 1, 2003, of tapes not made publicly available before April 12, 1996, shall no longer apply. This change is reflected in 36 CFR 1275.64.

##### *Settlement Agreement*

This Settlement Agreement ("Agreement") is made by and entered into among plaintiffs Stanley I. Kutler and Public Citizen; defendant/cross-claim defendant John W. Carlin, in his official capacity as Archivist of the United States; and defendant-intervenors/cross-claimants John H. Taylor and William E. Griffin, co-executors of the estate of Richard M. Nixon ("the Nixon estate"), in the above-entitled action by and through the parties' undersigned attorneys.

It is hereby agreed, by and among the parties, appearing through their undersigned attorneys, that this action is partially settled on the following terms:

##### TERMS OF AGREEMENT

1(a). As soon as practicable, the National Archives and Records Administration ("the Archives") will publicly release the segments of tape recordings made during the Presidency of Richard M. Nixon ("tape re-

cordings" or "tapes") identified by the Archives as relating to "abuses of governmental power," as defined by 36 C.F.R. Part 1275, along with the corresponding portions of the tape log and any other finding aid. The date of that release, which is expected to be on or about November 15, 1996, shall be determined in the following manner.

(b). No later than April 15, 1996, the Archives shall deliver to an agent of the Nixon estate a copy of the approximately 201 hours of abuses of governmental power tape segments that it proposes to release, together with the corresponding portions of the tape log and any other finding aid, for review by the Nixon estate to determine whether it intends to object to the release. The Archives agrees to provide a period of orientation to the designated Nixon estate agent with respect to the review of the abuses of governmental power tape segments and to be available to respond to questions thereafter.

(c). In place of the right to make all other objections with respect to the tape recordings that the Archives has designated as abuses of governmental power materials, the Nixon estate agrees that it may object to their release only on the ground that such designation by the Archives is clearly inconsistent with the term "abuses of governmental power" as used in section 104(a)(1) of the Presidential Recordings and Materials Preservation Act of 1974 ("the Act"), 44 U.S.C. §2111 note, and defined in 36 C.F.R. 1275.16(c), as qualified by 36 C.F.R. 1275.50(b). Any such objection shall be in writing and may not be based on isolated instances of alleged failure by the Archives to apply the appropriate review standard, but only on a pattern of misapplication of the requirements of the Act and its implementing regulations. Further, any such objection must be accompanied by specific examples of alleged review errors and contain sufficient information to enable the review panel described in subparagraph 1(e) below to locate those examples readily. Nothing in this paragraph shall preclude the Nixon estate and the Archives from having informal discussions regarding the appropriate treatment of any of the abuses of governmental power tape segments.

(d). The Nixon estate shall have until October 1, 1996, to submit any objection in accordance with subparagraph 1(c) above. If no such objection is filed, the Archives shall proceed to issue a notice of proposed release pursuant to 36 C.F.R. 1275.42 as soon as possible, but no later than October 15, 1996.

(e). If an objection is made, the matter shall be immediately referred to a panel of the following three Presidential Library archivists: David Alsobrook, Frances Seeber, and Claudia Anderson. If any of these three persons is unable to serve, the Archivist shall appoint a substitute who is acceptable to the other parties.

(f). The panel shall have such access to the tapes as it deems necessary to make its decision. The decision of the panel shall be either that the Nixon estate's objection is sustained or that it is rejected. The decision shall include a brief statement of the panel's reasons, but it need not include an item-by-item determination. In deciding whether the designation by the Archives of the material proposed to be released is clearly inconsistent with the definition of "abuses of governmental power," the panel shall consider whether the release would seriously injure legitimate interests of identifiable individuals, whether the errors suggest a pattern of misinterpretation, and any other factor that bears on the issue of whether the Archives' designation of material as relating to abuses of governmental power was reasonable, considered as a whole. The decision of the panel shall be made within sixty (60) days of the date of the objection. However, if the panel determines that exceptional circumstances interfere with its ability to meet this deadline, the panel shall have up to an additional sixty (60) days to make its decision. The Archives shall notify the other parties of the need for an extension and briefly describe the reasons therefor. The panel's decision shall be final and binding on all parties, and no party may exercise any right to appeal to any person, board, or court that might otherwise be available. Nothing contained in this Agreement shall preclude the panel from advising the Archives of any particular processing errors that it believes may have been made, but the Archivist shall make the final determination as to whether to accept such advice.

(g). If the objection of the Nixon estate is sustained, the Archives shall re-review the tapes sufficiently to address the concerns raised by whatever aspect of the objection is sustained. At the conclusion of such re-review, the same process of review, first by the Nixon estate and then by the panel in the event of further objection, shall be repeated for those tape segments concerning the subject matter of the sustained objection prior to any release of tape recordings designated as relating to abuses of governmental power.

(h). The Nixon estate agrees to inform the Archives and plaintiffs whether it intends to file objections as soon as it has made its decision. If there is an objection by the Nixon estate and it is overruled, the FEDERAL REGISTER notice shall be published within ten (10) days of the date of the panel's decision.

(i). If, following the FEDERAL REGISTER notice, no objection by other individuals to a release is received within the time provided by law, the Archives shall release the tape recordings within ten (10) days after such time has expired. If objections are received, they shall be promptly considered by the Archives and shall be decided as soon thereafter as practical. Any materials as to which

an objection to release has been timely filed shall not be released until such objection has been resolved pursuant to 36 C.F.R. 1275.44. All materials not objected to shall be released no later than thirty (30) days after the time for objections has expired, provided that the Archives may withhold any additional conversation to which no objection has been made, pending final resolution of an objection to another conversation, if (i) such additional conversation is in close proximity on the tapes to the objected-to conversation and it would be burdensome for the Archives to separate out the releasable and objected-to portions, or (ii) the subjects of the releasable and the objected-to conversations are closely related to one another and the Archives determines that it might be misleading or might unfairly prejudice a living individual to release only one conversation. Any release under this Agreement shall include the corresponding portions of the tape log and any other finding aid.

(j). The Archives shall send to plaintiff Kutler, to arrive no later than the day that the release of the tapes occurs, a copy of the portions of the tape log and any other finding aid that correspond to the tapes being released. The Archives shall also make suitable arrangements for plaintiff Kutler to listen to such tapes on the date of their release, and/or on such other subsequent business days as plaintiff Kutler shall designate.

2(a). Although the Agreement provides that the Archives will identify and return to the Nixon estate a copy of any private or personal materials identified on the tapes, the parties have been unable to reach agreement regarding the Archivist's retention and maintenance of the original tape recordings in their entirety, including those segments deemed to be private or personal, along with a master preservation copy. The government's position is that it is complying with the Act by retaining the original tapes and a master preservation copy, including those portions containing private or personal conversations. The Nixon estate's position, with which plaintiffs agree, is that the family has statutory, constitutional, and other rights that prevent the Archives from retaining private or personal materials, on both the original tapes and all copies.

(b). The parties have agreed to litigate the issue described in subparagraph 2(a) above, including the validity of 36 C.F.R. 1275.48(a) and 1275.64(e) as proposed for amendment. The parties further agree that the Court shall retain jurisdiction of that issue, as provided in paragraph 14 below, and that the right to litigate this issue includes the right to seek review in the United States Court of Appeals for the District of Columbia Circuit and the United States Supreme Court. If there is litigation between the Nixon estate and the Archivist over the issue described in subparagraph 2(a) above, the plaintiffs shall

support the Nixon estate in any such litigation by filing a brief supporting the estate's position in District Court. The parties agree to make all reasonable efforts to expedite resolution of this issue.

(c). This Agreement and all discussions, negotiations and exchanges of information leading to it shall be entirely without prejudice to any positions the parties may take in the event of such litigation. Nothing in this Agreement, in any discussions leading to it, or in any information or materials exchanged by the parties as part of the mediation may be relied on or disclosed by any party to support or rebut the position of any party with respect to the treatment of private or personal materials on the original tapes. Nothing in this subparagraph prevents any party from expressing its understanding as to the meaning and effect of the legal position of another party.

3. The Archives will provide to the Nixon estate any additional private or personal materials at approximately the time that the Archives proposes each segment identified in paragraphs 4 and 5 below for public release. Any additional copies of that material (other than on a master preservation copy, the status of which will be determined in accordance with the resolution of the issue as described in subparagraph 2(a) above), will be destroyed by appropriate method, with appropriate means of verification.

4(a). The second group of tapes to be processed for release is the approximately 278 hours recorded in the Cabinet Room. The projected date for publishing a notice of proposed opening of tapes in that group is August 1, 1997. The Archives will make the Cabinet Room tapes proposed for release available to the Nixon estate in no fewer than four (4) segments. The process by which those tapes will be reviewed by the Nixon estate, and the objections handled by the Archives, is set forth in the following subparagraphs of this paragraph 4.

(b). The Nixon estate agrees to review each segment as it is received and promptly to call to the attention of the Archives any concerns that it may have. The Archives and the Nixon estate agree to attempt to work out their differences informally in order to minimize any objections to a proposed release. To facilitate informal consultation between the Nixon estate and the Archives concerning the tape review, the Archivist shall designate a panel member identified in subparagraph 1(e) above who will serve as a contact with the Nixon estate and assure access to information relating to Presidential libraries practices and procedures that may arise in the course of the tape review. The designated individual will be responsible for assuring that the Nixon estate has access to the appropriate person to answer its concerns. The Nixon estate may communicate with the designated individual orally or in

writing. If the Archives agrees with the Nixon estate that any portion of a segment that has been sent to the Nixon estate as a proposed release should not be released, the Archives shall assure that there is appropriate documentation to reflect that change.

(c). The Nixon estate will have a period of at least six (6) months in which to review all of the Cabinet Room tapes, beginning on the date the Archives makes the first installment of such tapes available to the estate for review (but in no event will the six (6) months begin earlier than November 15, 1996). During the review of the Cabinet Room tapes, the Nixon estate will employ an agent or agents who will spend an average of at least thirty two (32) hours a week (total) in actual review of the tapes. The Nixon estate may request from the Archives an extension of the six-month review period, which the Archives shall grant if good cause is shown.

(d). If, during its review, the Nixon estate becomes aware that there are materials proposed for release that it believes should not be heard even by individuals on the registry list, it will promptly advise the Archives of any such materials so that they can be reviewed and/or segregated by the Archives before any other individual is permitted to listen to them. The Nixon estate will cooperate with the Archives so that the required FEDERAL REGISTER notice is published as soon as possible, but in no event shall such notice be provided later than ten (10) days after the time the Nixon estate completes its review. Final objections from the Nixon estate to the release of portions of the tapes shall be filed in accordance with 36 C.F.R. Part 1275 no later than the date for filing objections by other persons. Thereafter, subject to paragraph 7 below, the provisions of subparagraphs 1(i) and 1(j) above will apply.

5(a). The remaining tapes, consisting of approximately 2338 hours, shall be processed for release in five (5) segments. Because the precise number of hours of tapes for each month cannot readily be determined, the parties have agreed to divide the releases into the segments set forth below. The Archives will begin processing (which includes, but is not limited to, tape review, preparing tapes for declassification review, tape editing and production of finding aids) each segment before processing of the preceding segment is concluded. Processing of the tapes in each segment is projected to take from about fifteen (15) to about twenty three (23) months. The approximate number of hours of tapes to be reviewed in each segment is set forth in parentheses in the following listing of the segments. The projected number of months between the completion of the Archives' processing of the immediately preceding segment and the completion of the Archives' processing of each listed segment is set forth in brackets.

1. February 1971–July 1971 (437 hours) [8 months]
2. August 1971–December 1971 (405 hours) [7 months]
3. January 1972–June 1972 (440 hours) [7 months]
4. July 1972–October 1972 (410 hours) [6 months]
5. November 1972–July 1973 (646 hours) [10 months]

(b). The time estimates in this Agreement are not enforceable as such, but the parties agree to have the Court retain jurisdiction to consider requests that it enter a binding order setting a schedule for the Archives to complete the processing of the tapes. No party may seek such an order unless that party first provides twenty (20) days' written notice to the other parties of that party's intention to seek such an order. Further, no party may seek such an order except on the ground that the Archives has unreasonably failed to meet the estimates contained herein by a substantial amount. The type of proof that will demonstrate reasonableness on the part of the Archives in this regard may include, but will not necessarily be limited to, a showing that the Archives is reasonably allocating its resources among its various programs and activities in the event that it experiences a shortage of resources, including any occasioned by court order.

(c). Portions of each segment processed by the Archives shall be provided to the Nixon estate when the processing of each month of tape recorded material is completed, unless there are a very few hours for two (2) or more months, which may then be combined into a single unit. During its review of the chronological tape segments, the Nixon estate will employ an agent or agents who will spend an average of at least thirty two (32) hours a week (total) in actual review of the tapes, forty eight (48) weeks of the year. As its review of the tapes proceeds, the Nixon estate shall provide a written report of its progress to the Archives and the plaintiffs on a bi-monthly basis. The report shall include the number of hours worked in each week, the number of hours of tapes reviewed in each week, and the Nixon estate's projected completion date for review of the segment currently under review. The provisions of subparagraphs 4(b) and 4(d) above shall apply to the review, objections, and releases with respect to the chronological tape segments, subject to paragraph 7 below.

(d). If one of the other parties to this Agreement determines that the Nixon estate's review is not being conducted diligently or in good faith, or that the estate's estimated completion date(s) of one or more segments is unreasonable, that party may petition the Archivist to establish an earlier date(s) for the completion of the review of that segment and/or of future segments. Any such date(s) established by the Archivist

shall provide the Nixon estate with a reasonable opportunity to protect and assert its interests without unduly delaying the release of the tapes, and shall be based upon consideration of the progress of the Archives' review and its scheduled completion date(s); the progress to date of the estate's review; and the time reasonably necessary to complete the estate's review and to formulate and present any objections. The Archives may also propose earlier dates for the completion of the review by the Nixon estate on the basis provided for in this subparagraph. If a proposal for an earlier date is made, the Nixon estate will have a reasonable opportunity to respond.

6. Once the Archives has completed processing the approximately 2338 hours of tapes discussed in paragraph 5 above, and has made corresponding releases, the Archives shall identify any additional copies of partial tape segments in its possession. If the Archives determines that some or all of such additional partial tape segments are duplicative of any tape recordings that it has already processed, the Archives may dispose of the duplicative tape segments, following notification to the parties, subject to paragraph 3 above. To the extent that such partial tape segments are not duplicative of the tape recordings already processed, the Archives shall promptly process such non-duplicative portions and shall treat any portions determined to be private or personal consistently with the resolution of the issue to be litigated as described in paragraph 2 above.

7(a). After completion of the procedures described in paragraph 4 above, the Cabinet Room tapes that are found to be releasable under paragraph 4 above may be released if either there has been a final decision by the district court on the issue to be litigated as described in subparagraph 2(a) above, or the release is scheduled after April 1, 1998, whichever of these two events happens sooner.

(b). After completion of the procedures described in paragraph 5 above, the tapes described in paragraph 5(a) above that are found to be releasable may be released if either there has been a final judgment by the district court, which is not subject to further review by appeal or certiorari, with regard to the issue to be litigated as described in subparagraph 2(a) above, or there has been a final decision by the United States Court of Appeals for the District of Columbia Circuit on this issue, or the release is scheduled to take place after November 1, 1999, whichever of these three events happens sooner.

(c). As used in subparagraphs 7(a) and (b) above, the term "final decision" means a decision not subject to reconsideration under Rule 59 of the Federal Rules of Civil Procedure, or Rules 35 or 40 of the Federal Rules of Appellate Procedure, respectively.

8. The Nixon estate may, at any time, elect to use the procedures in paragraph 1 above with respect to any tape segment in place of the provisions of paragraphs 4(b) and (d) and 5(c) above, with the following substitution: The standard under which objections shall be made, and under which the panel shall decide their merits, is whether the release taken as a whole is plainly inconsistent with the requirements of the Act and its implementing regulations. Provided, however, that once the Nixon estate elects to use the procedures in paragraph 1 above in place of the provisions in paragraphs 4(b) and (d) and 5(c) above, it cannot subsequently revert back to the formal objection process set forth in 36 C.F.R. Part 1275 for that tape segment.

9. Within thirty (30) days of the Court's entry of an order as described in paragraph 14 below, the Archivist shall designate a particular person who shall be responsible for responding to reasonable inquiries from the plaintiffs on the status of the releases and objections. Such designation may be changed at any time at the Archivist's discretion by a notice to plaintiffs through their counsel.

10. If the Archives appoints a Senior Archival Panel as defined in 36 C.F.R. 1275.46(d) and (e), no party to the Agreement may object to the appointment of such a panel on the ground that the suggestion to appoint such a panel was originated by an individual other than the processing archivists assigned to the Archives' Nixon Presidential Materials Staff.

11. The Archives will allow members of the public to obtain copies of publicly accessible portions of the tapes after the releases described in paragraph 5 above, are completed; provided, however, that if the releases described in paragraph 5 above are not completed by December 31, 1999, the Archives will allow members of the public to obtain copies only of the abuses of governmental power tapes, together with any other tapes publicly released as of the date of the filing of this Agreement with the Court, beginning January 1, 2000. Further provided, that if the releases described in paragraph 5 above are not completed by December 31, 2002, the Archives will, beginning January 1, 2003, allow members of the public to obtain copies of all tapes that have been made available to the public by that date and tapes that subsequently become available, as they are released.

12(a). Promptly after the Court enters the Order provided for in paragraph 14 below, plaintiff Kutler will withdraw his request under the Freedom of Information Act, 5 U.S.C. 552, for any and all tape logs and other finding aids, which is pending in *Kutler v. Carlin, et al.*, Civ. A. No. 92-0661-NHJ (D.D.C.). In all other respects, plaintiff Kutler's request in that action shall be unaffected by this Agreement.

(b). Nothing in this Agreement shall affect the processing by the Archives of any dictabelts, which are a collection of recordings of former President Nixon and other White House staff members dictating memoranda, correspondence and speech drafts, that are included in the materials that are subject to the Act.

13. Pursuant to Rule 315 of this Court, the plaintiffs and the defendant shall attempt to resolve the plaintiffs' claim for attorneys' fees and expenses and shall advise the Court no later than forty-five (45) days after this Court has entered the Order provided for in paragraph 14 below on whether they have been able to resolve the issue of attorneys' fees and expenses. If no resolution has been reached, they will, at that time, recommend a schedule to the Court to resolve such claim.

14. The parties agree to the dissolution of the preliminary injunction entered on August 9, 1993, and dismissal with prejudice of this action, including all claims and cross-claims, except for the issue to be litigated as described in subparagraph 2(a) above, and any fees and expenses claimed pursuant to paragraph 13 above, by filing the attached Joint Motion to Vacate Preliminary Injunction and to Dismiss Claims, and the attached Consent Order. The parties agree that the Court shall retain jurisdiction to: (a) Consider the entry of an order in accordance with the terms of paragraph 5 above; (b) resolve the issue to be litigated as described in subparagraph 2(a) above; (c) determine any fees and expenses claimed pursuant to paragraph 13 above; and (d) for the purpose of enforcing the terms of this Agreement. The parties further agree that such jurisdiction, except with respect to the issue described in paragraph 2 above, will be retained only until the later of the implementation of paragraph 11 above or the completion of the releases called for in paragraph 5 above. Plaintiffs and the Nixon estate further agree that they will not challenge any regulations issued by the Archives which implement and are consistent with this Agreement.

15. The terms of this Agreement may not be altered except with the written consent of the parties. Nothing in this Agreement constitutes an admission of liability or wrongdoing on the part of any party.

Executed this 12th day of April, 1996.

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